No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS,
(a corporation),
Plaintiff in Error,

vs.

R. F. PRAY,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

It is respectfully submitted that the dissenting opinion in this action is the correct opinion therein and that the prevailing opinion is incorrect and that, therefore, a rehearing should be granted.

The prevailing opinion is based wholly on the case of Clunin v. First Federal Trust Company (64 Cal. Decs. 53), which case, it is respectfully submitted, is not at all in point. Therefore, such opinion must fall. The Clunin case correctly states the law as applied to the facts involved in that case, but such

facts are not at all like the facts involved in our case. In that case, as appears from the opinion of the Supreme Court of the State of California therein and as also appears from the prevailing opinion of this Court in our case, the writings by which it was sought to defeat the statute of limitations were check stubs, reciting the obligation on account of which the checks were given, and the checks themselves. Upon these facts the Supreme Court of the State of California very properly held that the stubs, although they described the indebtedness, could not be used to toll the statute of limitations as they were not communicated to the creditor and that the checks were insufficient for that purpose because they did not refer to any debt whatever. In confirmation of this, see page 55 of the opinion in the Clunin case where the Supreme Court of the State of California said:

> "So far as the stubs are concerned, it is well established in this state that they do not constitute an acknowledgment or a promise sufficient to take the case out of the statute of limitations, since they were never communicated to the creditor, Mrs. Clunin",

and also see page 57 of the opinion where the Supreme Court said:

> "The checks introduced in evidence do not come up to this standard since they contain no reference whatever to any debt or any language which can be said to be uncertain in its meaning and subject to explanation by the aid of extrinsic circumstances so as to be made to refer to a debt."

This is the sum and substance of the decision of the Supreme Court of the State of California in this Clunin case and it is apparent that it has no application whatever to our case.

In our case the defendant's letters to the plaintiff clearly refer to his obligation upon the note, which fact is conceded by the prevailing opinion of this Court. Consequently, the question in our case is, whether (the receipt by the creditor of letters referring to the indebtedness being conceded) such letters by their phraseology constitute a sufficient acknowledgment under section 360 of the Code of Civil Procedure of the State of California. A very different question from that involved in the Clunin case, where all the Court had to decide was, that the checks were insufficient because they referred to no debt whatever and that the stubs were insufficient because they were not communicated to the creditor.

So, the Clunin case must be eliminated from consideration so far as its facts and the questions really decided therein are concerned. And it must also be disregarded if any of the language of the opinion therein can be deemed to uphold the prevailing opinion in our case, since the language of the Court in the Clunin case can only be considered as applying to the facts of that case. But, as a matter of fact, even the language of the opinion in the Clunin case does not support the prevailing opinion in our case.

The only language in the opinion in the Clunin case, declaring the law in reference to the sufficiency of an acknowledgment under said section 360, is that contained in the following two quotations therefrom, the remainder of the opinion, so far as it deals with such question, being merely a resume of what has been held in a number of California cases as to the sufficiency of such an acknowledgment, namely: first, on page 55 of the opinion, where the Court said:

> "The law is well established in this state by numerous decisions that the acknowledgment or promise referred to in section 360 must be in writing, and that the writing, whether in the form of a promise or not, must contain some reference to an existing debt owing to the creditor which the debtor is willing to pay",

and, second, on page 57 of the opinion, where the Court said:

> "It is clear from all these decisions (referring to the decisions in California) that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay."

This language, which is, in effect, that the writing must refer to a debt that the debtor is liable and willing to pay, certainly does not uphold the prevailing opinion of this Court in our case, for it does just the contrary. But, passing that for a

moment, it is first necessary to ascertain the exact effect of this language. As the Court itself expressly says, it is a statement of the law in California based upon the decisions of its Supreme Court, a resume of the same being given in the opinion, as above mentioned. Consequently, this statement of the law must be read and interpreted solely with reference to what was really decided by the California cases referred to by the Court and not by what one might think the Court meant by the use of this language. In this connection, it must be remembered that the Court in the Clunin case did not attempt to prescribe what form the writing should take in order that it should "refer to an existing debt that the debtor is liable and willing to pay", and it had no occasion to do so, as the writings therein involved, to-wit: the checks and stubs, were insufficient because the stubs were not communicated to the creditor and the checks referred to no debt whatever. The Court, as said before, simply declared that its previous decisions laid down a general rule of law, namely, that the writing must refer to an existing debt that the debtor is liable and willing to pay, leaving the question as to what form the writing should take an open one except in so far as it had been determined by its previous decisions.

Now, reading this language of the opinion in the Clunin case, namely, that the writing must refer to a debt that the debtor is liable and willing to pay, with reference to the previous decisions of the

California Supreme Court referred to in said opinion, it is evident that this language does not mean, as the prevailing opinion in our case would seem to indicate, that the writing must state, in so many words, that the debtor is liable for the debt or that he is willing to pay the debt but it is sufficient if the writing amounts to an admission of the debt and does not show an intent not to pay, or in other words, if the writing recognizes the debt as an obligation the law will presume a willingness to pay.

An examination of these previous California cases shows this to be so. There is not even an intimation in any of them that the writing must state, in so many words, that the debtor is liable for the debt or that he is willing to pay it. And to the contrary is the case of Southern Pacific Company v. Prosser, 122 Cal. 413, the only case in California where the facts approach those in our case and the only case in California exactly in point on our case, *which Prosser case is cited with approval by the opinion in the Clunin case* and becomes by virtue of such approval, the latest construction of said section 360 by the California Supreme Court so far as the facts therein involved are concerned. This Court will recollect that the prevailing opinion holds that the latest construction of the state statute is to govern this Court. Consequently, this Court is governed by this Prosser case as its facts, as above stated, more nearly approach those in our case than do the facts of any other California case.

This Prosser case was cited by us both in our opening and closing briefs on the original submission of the appeal but is not even referred to in the prevailing opinion of this Court in our case, although the writer of that opinion, who also wrote the opinion in the case of Bullion and Exchange Bank v. Hegler, 93 Fed. 890, refers in his opinion in the latter case to said Prosser case and says that it correctly states the law. The portion of the opinion in the Clunin case referring to said Prosser case is omitted from the prevailing opinion of this Court in our case, although other portions thereof referring to other California cases, not at all in point, are set forth in said prevailing opinion. The opinion in the Clunin case quotes with approval the following from the opinion in the Prosser case (the same being entirely omitted from the prevailing opinion in our case), viz.:

> "The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and *without intimation of an intent to refuse payment thereof,* suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same."

As this Prosser case is so important and the only California case exactly in point and the case which must control the decision of our case, we hope this Court will pardon us for calling its attention again (we having already done so in our opening and closing briefs) to the wording of the acknowledg-

ment therein held by the Supreme Court of California to be sufficient to overcome the statute of limitations. This acknowledgment which was contained in a letter read as follows:

> "Dear Sir:
>
> Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can't you give me a chance to pay you in work? The company employ many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides.
>
> W. S. Prosser."

It is apparent that this acknowledgment is much weaker than that contained in the letter of December 11, 1918, written by the defendant in our case, for in the Prosser case he did not say that he would pay or could pay, but merely that he wanted to pay. In fact, his letter intimates that he cannot pay, as he asks the treasurer of the railroad company, to whom the letter was addressed, to let him pay his indebtedness by working for the company. Yet, the Supreme Court of California held that Prosser's letter was sufficient to toll the statute of limitations. The principle on which that case is based is, that a writing acknowledging the existence of the debt, *which does not show an unwillingness to pay,* is sufficient to overcome the statute of limitations. That is exactly the status of the above mentioned letter of defendant of December 11, 1918. Therefore, that letter is sufficient to toll the statute of limitations.

Now, to consider briefly the above mentioned letter of defendant and his other letters and the plaintiff's letters offered in evidence, all of which, as this Court says in the prevailing opinion in our case, relate to the note in controversy. We hate to take up this Court's time in doing this, as we have already done so in our opening and closing briefs, but it seems necessary so as to present clearly to this Court the fact that these letters are a sufficient acknowledgment to defeat the statute of limitations.

The letters offered by us in evidence most certainly constitute an acknowledgment of the note sufficient to toll the statute of limitations. Otherwise, they mean nothing. And in the construction of these letters this Court must bear in mind that it is not dealing with a case where judgment was rendered after full trial, on appeal from which the evidence is to be interpreted most strongly in favor of the trial court's decision, but that it is dealing with a case where a judgment of non-suit was rendered, on appeal from which, as well as on the decision of the motion for the non-suit itself, every intendment is to be in favor of the plaintiff and every doubt as to the evidence resolved against the defendant. Keeping this thought in mind, it is clear that the letters are a sufficient acknowledgment.

Passing over for the sake of brevity the earlier letters, we come to the letters of November 19 and December 11, 1918, which contain the real acknowledgment. The letter of November 19, 1918 (Tran-

script pages 27-8) was from the president of the plaintiff to the defendant and is to the effect that the plaintiff is holding the note sued upon in this action and that it has received thereon from the trustee for the maker $993.21, leaving a balance of $3506.79 due on the principal thereof. This letter also offers to release the defendant as a guarantor of the note upon his paying $1753.40, that is, one-half of the above balance. The real answer to this letter is found in the letter from the defendant to the president of the plaintiff dated December 11, 1918 (Transcript pages 30-1), the intervening letters being merely a letter dated November 26, 1918, from the defendant that he will answer the above mentioned letter of November 19, 1918, and a letter from the president of the plaintiff dated December 2, 1918, again asking defendant to answer said letter of November 19, 1918. Said letter of December 11, 1918, from defendant to the president of the plaintiff refers to the correspondence which had passed between them in regard to the note and states that defendant had been informed that there was in the hands of the trustee for the maker of the note a considerable amount of money, which would very soon be distributed among the creditors of the maker. In said letter defendant also states that he does not wish *to stall the matter off* but feels that before making settlement the amount received by the plaintiff from the trustee should be applied on the note.

What does this letter mean? It simply means that the defendant does not wish to put off paying the note but feels that before he does pay it the plaintiff should apply on the note the money which defendant says plaintiff will shortly receive from the trustee. As this is the purport of the letter, it is, of course, an acknowledgment of the note itself. What else could it be? When a guarantor on a note says to the holder of it that he does not wish to put off paying the note but that he feels that it is only right that the holder should apply what he receives from the maker before he, the guarantor, pays the note, what does he do? He certainly does not repudiate the note or indicate an intention that he cannot or will not pay it. But he does just the opposite. He unqualifiedly acknowledges that the note is a subsisting obligation as against him. There can be no other sensible meaning to this letter of defendant.

And this letter of defendant is also a promise to pay the note, for the defendant says in effect that he is ready to make payment but that before he does so he feels that the amount received from the trustee should be applied on the note. There is not a word in the letter to the effect that defendant repudiates the note or that he is not willing to or cannot pay it. The letter meets fully all the requirements as to acknowledgments sufficient to toll the statute of limitations.

It cannot be said that this acknowledgment or promise is conditional, as the defendant in this let-

ter does not make the application of the amount received from the trustee a condition of his paying the note. He merely says that he feels that it is only proper that such application should be made before he pays the note. But even if he did make it a condition it would make no difference, for plaintiff would not have to wait forever to receive more money from the maker of the note (it did wait two years and three months, which was certainly much more than a reasonable time, which is all that it would have to wait) and it appears that plaintiff never did receive anything more on the note since the defendant, on whom, as this Court well knows, rested the burden of proving payment, did not prove that anything more had been paid on the note than the sum of $993.21, which the complaint alleges, such allegation not being denied by the answer, was paid on May 15, 1918, such date being long prior to defendant's said letter of December 11, 1918. Therefore, even if the application of the amount received from the maker were a condition, the condition was fulfilled, because nothing was received.

Nor can it be said that defendant in his said letter is merely acknowledging the note to the extent of the amount the letter of the plaintiff of November 19, 1918, offered to take. The defendant's letter does not even intimate such a thing. Even if it did, however, it would cut no figure, for a debtor can acknowledge part of a debt and the acknowledgment will be good as to the part. See

Oliver v. Gray, 1 Harr. & G. (Md.) 204.

But, to repeat, there is nothing in the defendant's letter to indicate that he intended to acknowledge his liability for only part of the note. The letter refers to the note generally, and not to any partial liability upon it and when the defendant speaks about paying he does not say a word about paying only a portion. It is clear that when the defendant acknowledges the note he acknowledges his liability for the whole of it and not merely for a part. But if this Court should think that the phraseology of the letter is at all doubtful upon this point it must resolve such doubt in favor of plaintiff and hold that the letter intends to acknowledge the note as a whole, because, as we have said before, this is an appeal from a judgment of nonsuit and every doubt upon the evidence must be resolved in favor of the plaintiff. From this letter of defendant it is, at most, slightly doubtful whether defendant was referring to his willingness to pay the whole of the note or the portion thereof that the plaintiff had offered to take.

It is evident that this letter is alone ample to constitute an acknowledgment sufficient to toll the statute of limitations. And so, the subsequent letters may be eliminated from consideration. Defendant contends that in these subsequent letters, the first of which was written eight months after defendant's said letter of December 11, 1918, defendant merely offered to pay a part of the note. But even if he did, what difference would it make? He could not in this manner nullify or affect in any way the previous unqualified acknowledgment of

the note made in his said letter of December 11, 1918.

And if we turn back from the decisions to the law itself, we find that it (360, C. C. P.) reads:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract unless in some writing", etc.

The lawmakers intended to separate distinctly the acknowledgment from the promise. It is not according to the law that there must be an acknowledgment *and also a promise.* Confusion in argument has arisen over the failure to clearly point this out. *If the writing contains any statement of debtor's unwillingness to pay, it does not amount to an acknowledgment.* But if the writing does not contain any statement of unwillingness to pay, it amounts to an acknowledgment and such an acknowledgment *or* a promise will bind the debtor. Some Courts seem to have confused these two which the law clearly seeks to separate. The question is always—was there an acknowledgment *or* a promise? Here we have an acknowledgment sufficient to raise an implied promise to pay because it contains no expression showing an unwillingness to pay. Treating the indebtedness as subsisting amounts to an unqualified acknowledgment.

Our contentions are upheld by Justice Hunt in his dissenting opinion in our case, where he says that the letters written by the defendant, especially those dated December 11, 1918, and November 26, 1918, acknowledged the indebtedness and treated it

as a subsisting one, thereby constituting a sufficient acknowledgment to take the debt out of the statute of limitations. This is, we respectfully submit, the correct rule and is the rule laid down in the above mentioned case of Southern Pacific Company v. Prosser, where, as we have said before, although the acknowledgment was much weaker than the one in our case, yet the Supreme Court of California held it to be sufficient. That rule is, that where the writing is made prior to the running of the statute of limitations, which is, of course, the situation in our case, and the writing treats the obligation as binding upon defendant, it is not necessary that it say a word about payment. In our case the defendant's letter goes further and in addition to acknowledging the indebtedness expresses a willingness and intent to pay. Therefore, the acknowledgment in our case is more than sufficient and the judgment of non-suit was erroneous.

We have been compelled to extend this petition to considerable length as we feel, with all due respect to this Court, not only that the prevailing opinion of this Court incorrectly interprets the Clunin case and the law of the State of California as declared by the Clunin case and by other decisions of its Supreme Court but that if said prevailing opinion is allowed to stand a great injustice will be done the plaintiff. If it stands a debtor can write to the creditor and acknowledge the debt and say also that he is willing to pay and intends to pay and then turn around and defeat the creditor on

the ground that the debt is outlawed. It is respectfully submitted that this is not just and that, therefore, a rehearing should be granted us.

Dated, San Francisco,
May 16, 1923.

Respectfully submitted,
WILLARD P. SMITH,
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Attorneys for Plaintiff in Error and Petitioner.

WALTON C. WEBB,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 16, 1923.

WILLARD P. SMITH,
Of Counsel for Plaintiff in Error and Petitioner.